No. 199

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

ALFRED I. DUPONT TESTAMENTARY TRUST, et al.,

Petitioners,

vs.

OKEECHOBEE COUNTY, FLORIDA
Debtor,

Respondent,

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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To the Honorable The Supreme Court of the United States:

Your Petitioners, Alfred I. DuPont Testamentary Trust, Florida National Group, Inc. Participation Trust, Jessie Ball DuPont, Edward Ball and Madeline DuPont Ruoff, respectively show to this Court:

Statement of the Case

This case was filed by Okeechobee County, a political subdivision of the State of Florida, in the District Court of the United States for the Southern District of Florida under the authority of Sec. 83 of the National Bankruptcy Act as amended June 22, 1938, for the composition of its debts. At-

tached to the petition were written consents signed by creditors purporting to own bonds amounting to more than two-thirds of the total then outstanding. Petitioners answered, and the issues were referred to a Special Master. The Master filed a report in which he found that the Plan of Composition was fair and equitable, for the best interests of the creditors, did not discriminate unfairly in favor of any creditor or class of creditors; that the offer of the Plan and its acceptance were in good faith; that the County could not meet its debts as they matured, that the Plan had been accepted by two-thirds of the creditors, that the compensation to be paid to the fiscal agent was fair and reasonable; and recommended that an Interlocutory Decree be entered confirming the Plan. An Interlocutory Decree was entered March 31, 1941.

Petitioners appealed to the Circuit Court of Appeals for the Fifth Circuit. Between the time of taking the appeal and the date for hearing, a number of events occurred which in the opinion of Petitioners showed that the County and its fiscal agent had engaged in numerous transactions which would render the Plan unfair and inequitable, and which showed that the fiscal agent was profiting unduly thereby. None of these facts were known by the Master, the Court or the Petitioners at the time the interlocutory decree was entered. Petitioners thereupon filed in the Circuit Court of Appeals a Motion to Remand the cause to the District Court for dismissal, or, in the alternative, with instructions to set aside the Interlocutory Decree, permit the parties to introduce evidence with reference to the facts shown in the motion and determine whether such facts should require a contrary decision. The Motion was filed in the Circuit Court of Appeals because jurisdiction of the District Court over the case had terminated with the entry of appeal and the District Court could not amend or alter its Interlocutory Decree while the appeal was pending. Authority for

the procedure is found in the decisions of the Supreme Court of the United States in **Board of Liquidation vs. L. & N. R. R. Co.**, 109 U. S. 221, and **County of Dakota vs. Glidden**, 113 U. S. 222.

The Circuit Court of Appeals by its opinion **128 Fed. (2d) 451** held that the motion of the Appellants

> "is not germane to, is not a prosecution of, their appeal, and that the matters the motion sets out are not before us for consideration. It is equally clear that by their motion and their brief in support of it, they do not prosecute but on the contrary abandon their appeal, and that it should therefore be dismissed."

It did not instruct the District Court as to future procedure, or indicate whether there was any merit in the motion. The District Court, without waiting for the mandate, entered two orders (P 47 and P 50 Tr.) which vitally affected the financial status of the County and favored its fiscal agent, who was at that time the principal creditor of the County. These orders of the Court were made without notice to Petitioners.

Petitioners thereupon filed two Motions in the District Court: one to set aside the orders of June 19 and June 23, 1942 because they were made without notice and before the mandate was received; the other to set aside the Interlocutory Decree and to reopen the cause for the taking of additional testimony. (Pp. 55 & 57 T.) The latter motion was the same as the motion filed by them in the Circuit Court of Appeals. The District Judge denied both motions of the Petitioners on August 19, 1942 (pp. 74 T.) and on August 24, 1942, entered a final decree (p. 76 T.).

On November 5, 1942 (within 90 days) Petitioners appealed from that decree to the Circuit Court of Appeals. The County, a day or two before the hearing in the Circuit Court of Appeals moved to dismiss the appeal on the

ground that it was not taken within 30 days from the date of the final decree.

On April 26, 1943, the Circuit Court of Appeals dismissed the appeal, because it held that the time for taking an appeal from a final decree in such a proceeding was limited to 30 days by the provisions of Sec. 25, Chap. IV of the Chandler Act, 28 U. S. C. A. Sec. 48. See opinion in 135 Fed. 2d 577 Adv. Op.

If the order of dismissal be affirmed, the fairness and equity of the Plan will have been determined as of the date of the Interlocutory Decree dated March 3, 1941, without regard to facts, circumstances and transactions occurring subsequently thereto, but prior to the final decree. A court of bankruptcy, being a court of equity, should decide a case in accordance with the facts as they appear at the time the final decree is entered. Dismissal of the appeal constitutes a "final decision" of the entire cause.

Application for writ of certiorari is sought to determine one question: Does Sec. 25, Chap. IV of the Chandler Act of June 22, 1938 limit the time for taking an appeal from a "final decree" in a proceeding for composition of municipal debts to thirty days, or is the time for taking an appeal ninety days under Sec. 230, 28 U. S. C. A. which governs appeals from "final decisions" of District Courts under Sec. 225, 28 U. S. C. A.

The principal reason why the Writ should be issued is that neither subsection (f) of Sec. 403, Title XI, U. S. C. A., which authorizes the entry of a "final decree," nor any other provision of Chap. IX fixes the time within which an appeal may be taken from a "final decree," and this Court has not passed upon the question. It is an important question of national law. The Court of Appeals by construction has held that the provisions of Sec. 48, Title XI, U. S. C. A. Sec. 25, Chap. IV of the Act apply, even though Chap. IX does not so provide. Chaps. X, XI, XII, and XIII contain

express provisions that the provisions of Chaps. I to VII, with certain expressly stated exceptions, shall apply to proceedings under those Chapters. **Chap. IX does not contain such provisions.** This is an Act of Congress, which is of national application and is of vital importance to political subdivisions and taxing districts in all of the states. The Ninth Circuit Court of Appeals in **Bekins vs. Lindsay Strathmore,** 106 Fed. (2d) 586, and in **Jordan vs. Palo Verde,** 105 Fed. (2d) 601 held that Sec. 25 of Chap. IV was applicable to appeals from an **Interlocutory Decree** which granted an injunction notwithstanding the provisions of Sec. 227, Title 28, U. S. C. A., but apparently it did not consider Sec. 227.

A review of this question by this Court is important to Petitioners but review is necessary to prevent lower courts from applying the provisions of Chaps. I to VII to proceedings under Chap. IX, since Congress did not do so. The Circuit Court of Appeals should have applied the Act as written. Chaps. I to VII cannot be made applicable to proceedings under Chap. IX and the Court has no power to select one section for application and ignore the provisions of Sec. 225 and Sec. 230, 28 U. S. C. A. which otherwise control.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket, Alfred I. DuPont Testamentary Trust, et al., versus Okeechobee County, Florida, Debtor, No. 10505, and that said decree of the Circuit Court of Appeals may be reversed by this Honorable Court, and that Petitioners may have such other and

further relief in the premises as to this Honorable Court may seem meet and just.

Alfred I. DuPont Testamentary Trust, et al.
Florida National Group Inc. Participation Trust.
Jessie Ball DuPont,
Edward Ball,
Madeline DuPont Ruoff,
Petitioners.

GILES J. PATTERSON,
Counsel.

BRIEF ON PETITION FOR WRIT OF CERTIORARI

The Petition for certiorari raises only one question, What is the time allowed for the taking of an appeal from a "Final Decree" by a District Court entered under the authority of subsection (f) of Sec. 403, Title XI U. S. C. A.? (Chap. IX of the Chandler Act). The Circuit Court of Appeals for the Fifth Circuit held that such appeal must be taken within thirty days because of the provisions of Sec. 25, Chap. IV of the Chandler Act, Sec. 48, Title XI U. S. C. A. The Act of Congress, August 16, 1937, provided for the composition of debts by taxing units. Chap. IX is a reenactment of its provisions. It contains two express provisions for appeals from orders of a Court in such a proceeding: 1. in subsection (b) from an order of the District Court awarding fees, compensations, expenses, etc.; 2. in subsection (c) an appeal from an interlocutory decree which shall be "as in equity cases". It does not expressly authorize an appeal from the final decree provided for in subsection (f). A right of appeal therefrom must be found elsewhere in the general statute relating to appeals from final decisions of a District Court, (Sec. 225 U.S.C.A., Title 28), else there is no right of appeal. Sec. 225 had been

a part of the Judicial Code for many years before passage of the Chandler Act; it gave to the Circuit Court of Appeals

> "Appellate jurisdiction to review by appeal or writ of error final decisions—First. In the District Court, in all cases" etc.

A "final decree," under the Act of August 16, 1937, is a final decision. Appellate jurisdiction of the Circuit Court of Appeals was conferred by Sec. 225. No other act was applicable. The Chandler Act was passed June 22, 1938. It reenacted the statute of August 16, 1937 in exact language as Chap. IX. On May 9, 1942, Congress amended Sec. 225 with full knowledge that Chap. IX of the Chandler Act of 1938 was in existence. Section 225 now reads:

> "The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions—First. In the District Court **in all cases.**"

The reenactment of this statute after the passage of the Chandler Act substantiates our contention that this Section is applicable. A Final Decree under Chap. IX is a "final decision". The final decree entered by the Court in this cause was a final decision of all issues. The decree discharged the debtor from all debts dealt with in the Plan and made the Plan binding upon all creditors. It completely disposed of the controversy. Hence under Sec. 230 Petitioner had 90 days within which to appeal.

When the Congress undertook to reenact the Bankruptcy Law and to recodify it in the Chandler Act, it made Sec. 403, Title XI a part of that statute and designated it "Chap. IX." It did not add to nor subtract therefrom. The Chandler Act also included other Acts relating to compositions, adjustments and settlements;—agricultural compositions, which are now included as Chap. VIII; old Sec. 77 B relating to corporate reorganizations, now Chap. X; "Ar-

rangements", now Chap. XI; "Real Property Arrangements", now Chap. XII; "Wage Earners Plans", now Chap. XIII; and old Sec. 77 relating to railroad reorganization, now Chap. XV. Chaps. X, XI, XII, and XIII are preceded by two new sections which were not a part of the Acts as originally passed; one provides that the provisions of the respective chapters shall apply exclusively to proceedings under those chapters respectively; the other:

> "The provisions of Chaps. I to VII inclusive, of this Act shall in so far as they are not inconsistent or in conflict with the provisions of this Chapter apply in proceedings under this Chapter,"

subject to certain designated exceptions to the general rule. **No such section was included or added to Chap. IX.** Nor is there any other provision of the Chandler Act which can by implication be construed as making any part of Chaps. I to VII applicable to the provisions of Chap. IX as the Circuit Court of Appeals for the Fifth Circuit has held. If the provisions of Sec. 25, Chap. IV are applicable to proceedings under Chap. IX, then all sections of Chaps. I to VII are applicable, else how can one determine which sections are applicable and which are not? A mere superficial reading of Chap. IX will show that only a few of the provisions of Chaps. I to VII could be applicable to proceedings under Chap. IX. The former relate to voluntary proceedings and to involuntary proceedings on the petition of three creditors; to the title to property of the bankrupt, the assets to be administered by a court of bankruptcy, and provide ways for administering those assets through the appointment of a trustee. They authorize meetings of creditors, selection of trustees by creditors, liquidation of assets, etc. None of these sections can be made applicable to a proceeding under Chap. IX, because the constitutionality of that chapter rests solely upon the

fact that the Federal Government did not attempt to regulate the governmental functions of a municipality, nor interfere with the control of it by the state. See **Lindsay Strathmore Ir. Dist vs. Bekins 304 U. S. 27.** A Federal Court can not take possession of the assets of a taxing District, and cannot appoint a trustee without violating this constitutional premise. A municipality has no assets in the sense in which that word is used with reference to individuals and private corporations. No discharge can be granted except to the extent of the agreement made between the debtor and two-thirds of its creditors, which is a condition precedent to the jurisdiction of the Court. The Court has no power to change the terms of that agreement; it must either confirm or dismiss, and if the terms of that agreement are altered by the consenting parties to the disadvantage of the non-consenting creditors, it should not confirm it as a fair and equitable plan.

Congress could not have made Chaps. I to VII applicable to proceedings under Chap. IX without specifying the exceptions. Congress did not make them applicable, and we submit that the Circuit Court of Appeals by its decision has in effect written into Chap. IX a provision which Congress itself did not, and has thereby laid the foundation for Courts to write into Chap. IX other sections of Chaps. I to VII. Sec. 25 of the Chandler Act, has no application to an appeal from a final decree under Chap. IX. Likewise Sec. 227, 28 U. S. C. A. which relates to appeals from interlocutory injunctions, control an appeal from an interlocutory decree if it includes an injunction as authorized by subsection (e) of Sec. 403. They are to be taken "as in equity cases". Otherwise, ten days will be allowed for appeals from interlocutory injunctions under Chap. IX in addition to the time allowed for appeals from interlocutory injunctions in other cases. This inconsistency is eliminated by giving to the phrase "as in equity cases" its

true meaning. The decisions of the Ninth Circuit Court of Appeals in **Bekins vs. Lindsay Strathmore,** supra, and in **Jordan vs. Palo Verde Irr. Dist. 105 Fed. (2d) 601,** holding that Sec. 25 was applicable to appeals from interlocutory decrees were made without consideration of this fact. Instead of producing uniformity, they would destroy it.

The only decision of this court which casts any light upon this problem is its statement in **Meyer vs. Kenmore Granville Hotel Co.,** 297 U. S. 159, that appeals from proceedings under Sec. 77 B were controlled by old Secs. 24 and 25 of Title 28, U. S. C. A., **because old Sec. 77 B, subsection (k) provided that**

> "all other provisions of this Title except such as are inconsistent with the provisions of this Section shall apply to proceedings instituted under this Section, whether or not an order to liquidate the estate has been entered."

We construe this statement as holding that the basic reason for the Court's decision was the express provision of Sec. 77 B that they should apply. The converse of this statement would seem to be true. If Sec. 77 B had not so provided, the Court would not have so concluded.

The construction of the statute for which we contend is in accord with the usually accepted rule of **expressio unius exclusio alterius.** Congress saw fit to expressly provide in old Sec. 77 B and in some chapters of the Chandler Act that the provisions of Chaps. I to VII should apply to proceedings thereunder; we must conclude that it deliberately omitted such a provision in Chap. IX. A Court should not judicially legislate such a provision into the statute, even though the Court might think the thirty day limitation should be long enough.

But the error of the Circuit Court of Appeals is even more serious. If allowed as a precedent, Courts in the future

may read into Chap. IX other sections of Chaps. I to VII. If the Court can read one of those sections into it, it may read others.

The injustice done to Petitioners is emphasized by the refusal to consider the motion of Petitioners, which raised a very serious question as to the fairness and equity of the Plan, and by the order of the District Judge denying Petitioners an opportunity to offer evidence of the facts occurring after the entry of the interlocutory decree. Refusal of the Circuit Court of Appeals to consider the motion to remand did not justify the District Court's refusal to admit evidence.

The equities of the case in the light of all facts should have been considered by the District Court before the Final Decree was entered. Ordinarily, an appeal from an interlocutory decree would determine the equities, but in a case like this, unfairness exists by reason of facts occurring subsequent to the entry of the interlocutory decree. A right of appeal must exist. Ninety days for taking an appeal from a final decree under Chap. IX is no more unreasonable than ninety days for appeal from any other "final decision." In both classes of cases the decision is final. The necessity for a speedy administration and liquidation of assets is not a factor. The date of the refunding bonds was fixed by the Plan. They bear interest from that date. No bondholder will be injured by allowing ninety days instead of thirty days for taking an appeal.

All of which is respectfully submitted.

Attorney for Petitioners.